Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

MATTHEW S. ENGLISH,

Petitioner,

v.

SHERRY BURT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the last reasoned state court judgment reaches and rejects the merits of Petitioner's federal constitutional claim and declines to invoke a procedural bar, and where state prosecutors take no position on procedural default and file no briefs of any kind in the state court proceedings, whether an ambiguous form order by the state supreme court can properly be interpreted by a federal court as having invoked a procedural bar to federal review?

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Petitioner Matthew English respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 6, 2004.

OPINIONS BELOW

The district court's opinion and order (per Cleland, D.J.) granting Respondent's motion for summary disposition and dismissing Petitioner's petition for writ of habeas corpus was entered on May 17, 2004. It is appended (Pet. App. 6a-13a) and is not otherwise published. The district court's opinion and order denying Petitioner's motion for issuance of a certificate of appealability was entered on June 30, 2004. It is appended (Pet. App. 2a-5a) and is not otherwise published. The Sixth Circuit order denying Petitioner's petition for certificate of appealability was entered on December 6, 2004. It is appended (Pet. App. 1a) and is not otherwise published.

STATEMENT OF JURISDICTION

The Sixth Circuit entered the opinion and order which is the subject of this petition on December 6, 2004. The district court had jurisdiction pursuant to 28 U.S.C. § 2254. The Sixth Circuit had jurisdiction pursuant to 28 U.S.C. § 2253. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Provisions of the Sixth Amendment to the United States Constitution and 28 U.S.C. § 2254 relevant to this petition are reprinted in the Appendix. (Pet. App. 20a-21a).

STATEMENT OF THE CASE

On April 12, 2000, Petitioner Matthew English was involved in a fatal automobile accident. He was unable to recall how the accident occurred. On December 27, 2000, in St. Clair County Circuit Court, Mr. English was convicted by his plea of nolo contendere of two counts of vehicular manslaughter and one count of felonious driving. On May 29, 2001, the trial judge sentenced Mr. English to five (5) years probation, with the first year in custody, including house arrest, "boot camp" and other conditions. On June 19, 2001, Mr. English filed a claim of appeal to the Michigan Court of Appeals. Prior to the date scheduled for filing Mr. English's brief on appeal, on July 19, 2001, the Court of Appeals dismissed the appeal, citing the Michigan procedural rule that a plea-based conviction "is not appealable as a matter of right." MCR 7.203(A)(1)(b).

On July 25, 2001, Mr. English pled guilty to violating conditions of his probation. On August 7, 2001, the trial judge discharged Mr. English from probation as a violator without improvement and sentenced him to a prison term of seventy-two (72) to one hundred eighty (180) months, with credit for time served totalling one hundred sixty-nine (169) days.

On August 8, 2002, Mr. English moved in St. Clair County Circuit Court for relief from judgment pursuant to MCR 6.500, *et seq.*, alleging a violation of his federal constitutional right to the effective assistance of counsel in connection with his lawyer's performance at the trial court level. In his motion, Mr. English claimed actual innocence and that his lawyer had failed to conduct an adequate investigation into the cause of the crash. Mr. English's motion was supported by detailed affidavits and thoroughly

documented reports from accident reconstructionists demonstrating that the victim's vehicle, rather than Mr. English's, had caused the automobile accident. Significantly, the defense experts' findings were consistent with the initial police investigation which suggested that it had been the victim's car which had crossed the center line of the road, causing the accident.

On August 22, 2002, the trial judge reached the merits of, and denied, Petitioner's ineffective assistance of counsel claim without conducting a hearing and without directing a response from the prosecution.

On October 10, 2002, the Michigan Court of Appeals denied Petitioner's application for leave to appeal without receiving a response from the prosecution. In fact, the court ruled before the date set for the filing of the defendant-appellant's brief on appeal. The application for leave to appeal raised the identical issue to that raised in the trial court motion for relief from judgment.

On March 31, 2003, the Michigan Supreme Court denied Petitioner's timely filed application for leave to appeal in a one-sentence form order. The application for leave to appeal raised the same federal constitutional issue that had been raised in the lower courts, and again, the prosecution filed no response to the application.

On September 5, 2003, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising the same federal constitutional claim. On May 17, 2004, the district court granted Respondent's motion for summary judgment, dismissing Petitioner's petition. The district court interpreted the Michigan Supreme Court's ruling as a finding

of procedural default — *i.e.*, that Petitioner had failed to raise the issue on direct appeal as required by state law — and found that that ruling constituted an independent and adequate basis for the denial of relief. On June 30, 2004, the district court denied Petitioner's motion for issuance of a certificate of appealability. On December 6, 2004, the Sixth Circuit denied Petitioner's motion for issuance of a certificate of appealability.

REASON FOR GRANTING THE PETITION

Where The Last Reasoned State Court Judgment Reaches And Rejects The Merits Of Petitioner's Federal Constitutional Claim And Declines To Invoke A Procedural Bar, And Where State Prosecutors Take No Position On Procedural Default And File No Briefs Of Any Kind In The State Court Proceedings, An Ambiguous Form Order By The State Supreme Court Cannot Properly Be Interpreted By A Federal Court As Having Invoked A Procedural Bar To Federal Review Of A Federal Constitutional Claim.

During the collateral state proceedings, the trial court reached the merits of Mr. English's federal ineffective assistance of counsel claim. That merits decision is the sole basis relied on by the trial court for its decision. (Pet. App. 16a-18a).[1] Given the subsequent procedural history in state

1. The trial court ruled that counsel was not ineffective for failing to conduct an investigation into the cause of the fatal accident because the prosecution was able to produce evidence at preliminary examination that Petitioner's vehicle crossed the center line thereby demonstrating that Petitioner was responsible for the accident. (Cont'd)

court, the trial court's merits consideration belies any claim of procedural default, particularly where, as here, the state prosecutor never asserted a procedural bar at any point during the collateral appeal.

"[A] federal claimant's procedural default precludes federal habeas review . . . only if the last state court rendering a judgment in the case rests its judgment on the procedural default." *Harris* v *Reed*, 489 U.S. 255, 262, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989). If the state court does not actually enforce the procedural rule in question, the "federal court implies no disrespect for the state by entertaining the claim." *County Court of Ulster County, N.Y.* v *Allen*, 442 U.S. 140, 154, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979).

In *Ylst* v *Nunnemaker*, 501 U.S. 797, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991), this Court directed that a presumption be applied in cases where an explicit merits decision in the trial court is followed by an unexplained order in the state appellate court:

> The question presented by the present case, therefore, is how federal courts in habeas proceedings are to determine whether an unexplained order (by which we mean an order whose text or accompanying opinion does not disclose the reason for the judgment) rests primarily on federal law. The question is not an easy one. In [*Coleman* v

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(Cont'd)

The trial court's ruling ignored substantial evidence that: (a) the initial police investigation suggested that it had been the victim's car which crossed the center line and caused the accident; and (b) two separate defense accident reconstructionists concurred in the findings of the initial police investigation.

> *Thompson*, 501 U.S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991)] itself, although the order was unexplained, the nature of the disposition . . . and surrounding circumstances (in particular the fact that the state had rested its argument entirely upon a procedural bar), indicated that the basis was procedural default. But such clues will not always, or even ordinarily, be available. Indeed, sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent.
>
> The problem we face arises, of course, because many formulary orders are not meant to convey *anything* as to the reason for the decision. Attributing a reason is therefore difficult and artificial. We think that the attribution necessary for federal habeas purposes can be facilitated, and sound results more often assured, by applying the following presumption: *where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment . . . rest upon the same ground. If an earlier opinion "fairly appear[s] to rest primarily on federal law," [Coleman, 111 S. Ct. 2559], we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment . . . in place.*

Ylst, 111 S. Ct. at 2594 (emphasis supplied). While the *Ylst* presumption is a rebuttable one, nothing in the procedural history of this case remotely rebuts the presumption here.

At no time during the state collateral proceedings in this case did the state prosecutor argue a procedural default. In fact, the state prosecutor never filed a brief at any point during the state collateral proceedings. Moreover, during the state collateral proceedings, neither the trial court, nor the court of appeals, nor the Michigan Supreme Court ever expressly invoked a procedural default. The trial court rejected the ineffective assistance of counsel claim on the basis that the prosecution's accident reconstructionist, presented at preliminary examination, had concluded that Mr. English was to blame for the accident. Consequently, the trial court reached the factual predicate of the ineffective assistance of counsel claim and rejected it on the merits.

Similarly, in the Michigan Court of Appeals, the court expressly indicated that it was rejecting the application for leave to appeal "for lack of merit on the grounds presented." (Pet. App. 15a). The court of appeals never invoked a procedural default, nor did the court even mention MCR 6.508(D)(3) at all.

Finally, the Michigan Supreme Court issued a one-sentence form order citing MCR 6.508(D) without further explanation.

This Court's decision in *Ylst* dictates that in this context, the Michigan Supreme Court's form order should not be construed as invoking a procedural default against Petitioner. Significantly, the Michigan Supreme Court did not cite any of the specific subsections to MCR 6.508(D). If, as Respondent argued below, the Supreme Court had found specifically that Michigan's procedural rules barred this collateral appeal, the Court necessarily would have cited to subsection (D)(3) of MCR 6.508. By citing only the most

general language of MCR 6.508(D), a majority of the Court's seven justices may only have been able to reach an agreement that Mr. English had simply failed to carry his threshold "burden of establishing entitlement to the relief requested".

In addition, there are numerous non-procedural default interpretations that can reasonably be assigned to the language used by the Michigan Supreme Court. The language used is consistent with a ruling considering, and rejecting, the ineffective assistance of counsel claim on the same basis as that adopted by the trial court — on the merits. Alternatively, one or more of the justices of the Michigan Supreme Court could have determined that Mr. English had failed to sustain his "burden of establishing entitlement to the relief requested" under MCR 6.508(D) because the claim raised in the application for leave to appeal failed to address an issue of "significant public interest", or an issue "of major significance to the state's jurisprudence", etc. — prerequisites to any review by that court. MCR 7.302(B)(2) and (3). The latter bases do not constitute grounds of procedural default.

The lower courts' rulings are flawed for additional reasons as well. First, even assuming arguendo that the Michigan Supreme Court had based its ruling on a true procedural default — *i.e.*, that this claim should have been raised in Mr. English's direct appeal or be forfeited under MCR 6.508(D)(3) — such a ruling would not foreclose federal review under 28 U.S.C. § 2254 because Mr. English was neither entitled to a direct appeal by right, Mich. Const. 1963, Art. 1, § 20, nor was he entitled to appointed counsel to pursue an appeal by leave, MCR 6.425(E)(2), critical facts entirely overlooked by the federal district court judge. Such a ruling by the Michigan Supreme Court would be an "unreasonable determination of the facts in light of the evidence presented . . ." 28 U.S.C. § 2254(d)(2).

Second, even if the Michigan courts had invoked a procedural bar, Petitioner would have easily met the "cause", "prejudice" and "actual innocence" exceptions to procedural default under MCR 6.508(D)(3)(a) and (b). The "cause" of Petitioner's failure to raise the claim during direct appeal was that he had no right to a direct appeal.[2] He was prejudiced by virtue of trial counsel's lack of adequate investigation of the facts of the case, which incompetence led to Mr. English's loss of his right to a trial by jury at which the outcome of his case would likely have been different. His "actual innocence" was established through the initial police investigation and the reports of the defense accident reconstructionists who found that Mr. English was not to blame for the accident. *See* note 4, *infra.*

Third, the Michigan courts erred in their factual analysis of the ineffective assistance of counsel claim. The trial court relied upon the fact that the prosecution had presented testimony at preliminary examination which tended to show that Petitioner was to blame for the accident. However, Petitioner had the right to contest that evidence with his own defense experts at trial, a right squandered by trial counsel's ineffectiveness. Counsel knew that Mr. English had no recollection of the accident, and he knew that the initial police investigation suggested that Mr. English did not cross the center line, yet counsel failed to conduct his own investigation with a qualified expert. The state trial judge's focus on whether or not *the prosecution* had presented inculpatory evidence at preliminary examination misses the

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2. As noted above, Petitioner's first appeal was rejected by the Michigan Court of Appeals prior to the time limit for the filing of the Defendant-Appellant's Brief on Appeal. As such, it apparently made no difference to the state appellate court whether or not Petitioner raised a federal constitutional claim.

point. The question is whether: (1) *defense counsel* investigated adequately; and (2) if defense counsel had conducted a reasonable investigation, expert defense evidence would have been available to refute the prosecution's claim that Petitioner's vehicle had caused the accident.

In the instant context, a federal reviewing court is not obliged to accord deference to the state courts' procedural or substantive rulings, nor does the traditional "presumption of correctness" apply. 28 U.S.C. § 2254(e)(1). In *(Terry) Williams* v *Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), a total of five justices joined in the pertinent section of Part II of the decision which holds that federal courts are not required under the AEDPA[3] to defer to state judges' interpretations of federal law. Writing for this block of five justices, Justice O'Connor observed that "it is significant that the word 'deference' does not appear in the text of the [AEDPA] itself".

> When federal judges exercise their federal- question jurisdiction under the "judicial Power" of Article III of the Constitution, it is "emphatically the province and duty" of those judges to "say what the law is". *Marbury* v *Madison*, 1 Cranch 137, 177, 2 LEd 60 (1803). At the core of this power is the federal courts' independent responsibility — ... independent from the separate authority of the several states — to interpret federal law. A construction of the AEDPA that would require the federal courts to cede this authority to the courts of the States would be

3. The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (1994 ed. Supp. III).

> inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution.

Id., 120 S. Ct. at 1505. These five justices also defined a state court "'decision' as a legal judgment rendered 'after consideration of *facts, and . . . law*' ". *Id.* 1509 (citations omitted, emphasis supplied). That is, when a federal reviewing court makes its independent determination regarding the issue of ineffective assistance of counsel, it need not defer to the state court's analysis or findings. Similarly, when a reviewing federal court decides whether the federal ineffective assistance claim survives the state's ban on the appeal (by right) of guilty pleas, it likewise need not defer to the state court's legal analysis or factual findings. Rather, a federal court retains the power to grant relief if it finds that the state court's decision was erroneous in a context where the error(s) was a violation of a petitioner's federal constitutional right to the effective assistance of counsel.

Consequently, if the Michigan Supreme Court's form order was based on a finding that: (1) the failure to raise the claim on direct review constitutes a procedural default of all claims, even federal constitutional claims; or (2) Michigan's procedural rule (barring appeals as of right to plea-based convictions) defeats federal jurisdiction — these findings are reviewable and reversible in federal court. The district court was simply wrong in concluding that the "independent and adequate state ground" doctrine applies in this context. Ultimately, both bases cited above rely on, or result from, the fact that Petitioner had no appeal of right following a nolo contendere plea. A state procedural rule eliminating a criminal defendant's appeal by right may be an "independent" basis for the state courts' decision: however, it is not an

"adequate" basis for rejecting a viable federal constitutional claim based upon the deprivation of the federal right to the effective assistance of counsel.

> [E]ven where a state court decision is based entirely on an independent state procedural ground, that ground must be a constitutionally "adequate" one.

Skipper v *French*, 130 F.3d 603 (4th Cir. 1997), *quoting James* v *Kentucky*, 466 US 341, 348-49, 104 S. Ct. 1830, 1835, 80 L. Ed. 2d 346 (1984). *See also Ford* v *Georgia*, 498 U.S. 411, 424, 111 S. Ct. 850, 857-58, 112 L. Ed. 2d 935 (1991) (applying constitutional adequacy requirement to reject state supreme court's ad hoc procedural bar of federal claim).[4]

The federal court of appeal's decision to deny a certificate of appealability also was clearly erroneous. Pursuant to 28 U.S.C. § 2253(c), a certificate of appealability is issued where "the applicant has made a substantial showing of the denial of a constitutional right". Where, as here, the lower court's ruling results in a dismissal of a petition on procedural grounds, Petitioner is required to demonstrate only that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and would also find debatable the district court's ruling on

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4. In fact, the Sixth Circuit has acknowledged this principle recently in *Deitz* v *Money*, __ F.3d __, 2004 WL 2849573 (6th Cir. (Ohio)), where it held that a state procedural rule which grants absolute discretion to a state appellate court as to whether to consider late appeals is not one that is "firmly established and regularly followed", and therefore is not "adequate" for purposes of the rule allowing an "adequate and independent state ground" to foreclose habeas review. *Id.* *5.

the procedural issue. *Slack* v *McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

The *Slack* standard is much less stringent than is the standard for success on the merits and does *not* require Petitioner to demonstrate either that he is likely to succeed on appeal or even that any reasonable judge would, after hearing the appeal, rule in his favor. As this Court stressed in *Miller-El* v *Cockrel*, 537 U.S. 322, 338, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003):

> A prisoner seeking a COA must prove "'something more than the absence of frivolity' " or the existence of mere "good faith" on his part . . . *We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in Slack, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."* 529 US at 484, 120 S Ct 1595.

(Emphasis added).

Based upon all of the foregoing, in the instant case, at the very least, "reasonable jurists would find the district court's assessment of the constitutional claims debatable" and would also find the district court's assessment of the procedural issue

debatable. First, Petitioner's contention that the Michigan Supreme Court's form-order ruling did not invoke a procedural default is well supported by this Court's holding in *Ylst*, and consequently, the issue is manifestly "debatable". Second, as noted above, Petitioner provided substantial documentary and affidavit support for his claim of actual innocence, which would operate as an exception to any theoretical procedural bar under Michigan's rules. MCR 6.508(D)(3). While the district court found that Petitioner failed to *"establish"* actual innocence, jurists of reason would find it debatable whether Petitioner is obligated at this stage to *"establish"* actual innocence rather than make a colorable claim of actual innocence. *Cf., e.g., Rust* v *Zant*, 17 F.3d 155, 160 (6th Cir. 1994). The district court has erroneously erected a new threshold for granting a certificate of appealability much higher than the threshold set out by Congress in 28 U.S.C. § 2253(c). Congress did not intend — and could not fairly have intended — a petitioner seeking review of a state court action to "*establish*" actual innocence as a threshold matter in order to litigate whether he to she is unconstitutionally incarcerated. Rather, it is sufficient that, on the basis of the substantial evidence Petitioner presented, jurists of reason would find it debatable whether any procedural default — if there were one — should be excused on the basis of the fundamental miscarriage of justice or actual innocence exceptions.[5]

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5. In denying Petitioner's motion for issuance of a certificate of appealability, the district court stated that Petitioner "presented only bare allegations that an investigation would have proved that he was not the driver of the car . . . he presents no evidence that he is actually innocent." Order at p. 3. This statement is demonstrably incorrect. In support of his petition, Petitioner appended substantial evidence of actual innocence — the detailed reports of two accident reconstruction experts, each of whom supports with specificity Petitioner's theory of how the accident occurred. One report is three pages long and the other report is twelve

(Cont'd)

Consequently, the district court and the court of appeals should have granted the petition for certificate of appealability so that these issues could have been briefed and considered fully.

CONCLUSION

Pursuant to United States Supreme Court Rule 10(a), certiorari should be granted because the court of appeals' decision in this case is at odds with this Court's authority on these issues; and, consequently, consideration by the Court is necessary to secure and maintain uniformity of decisions.

For the foregoing reasons, Petitioner Matthew English respectfully requests that certiorari be granted in this case.

Respectfully submitted,

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pages long. Both reports are supported by attached copies of photographs, and one report is further supported by three additional pages of diagrams. These materials document that Petitioner unquestionably presented far more than "bare allegations". Whether or not the district court would ultimately have agreed with the experts' conclusion had the court considered them substantively, it cannot be reasonably denied that these material represent substantial, detailed evidence of actual innocence.

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR CERTIFICATE OF APPEALABILITY FILED DECEMBER 6, 2004

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1717

MATTHEW S. ENGLISH,

Petitioner-Appellant,

v.

SHERRY BURT, Warden,

Respondent-Appellee.

ORDER

Matthew S. English, a Michigan state prisoner, moves through counsel for a certificate of appealability and appeals a district court judgment dismissing his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254.

Upon consideration, the motion for certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Clerk

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DENYING PETITIONER'S MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY FILED JUNE 30, 2004

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 03-CV-73385-DT

MATTHEW S. ENGLISH,

Plaintiff,

v.

SHERRY BURT,

Defendant.

ORDER DENYING CERTIFICATE OF APPEALABILITY

Pending before the court is Petitioner Matthew English's "Motion and Brief for Issuance of Certificate of Appealability," filed on June 2, 2004. The court dismissed English's petition for a writ of habeas corpus on May 17, 2004, and now denies his instant request for a certificate of appealability.

Appendix B

Before a habeas corpus petitioner may appeal a federal court's dispositive decision dismissing his petition, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). The court must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997).

A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The substantial showing threshold is satisfied when a petitioner demonstrates "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a prisoner's habeas corpus petition is denied on procedural grounds, a certificate of appealability "should issue . . . if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

In its May 17 order, the court held that habeas relief was precluded because Petitioner had not presented his claim to the state courts in accordance with state procedural rules. *See Wainwright v. Sykes*, 433 U.S. 72, 85-87 (1977); *Couch v. Jabe*, 951 F.2d 94, 96 (6th Cir. 1991). The court found that

the last state court rendering a decision in Petitioner's case held that his claim was barred because it had been procedurally defaulted, and thus federal habeas review was unavailable. Although the Michigan Supreme Court decision denying him leave to appeal was brief—simply relying on Michigan Court Rule 6.508(D) in denying Petitioner leave to appeal—the record indicated that Petitioner failed to raise his ineffective assistance of counsel claim on direct appeal and thus was procedurally defaulted under state law. Thus, the court found that the state court's decision was based on an independent and adequate state procedural rule, and that Petitioner was precluded from seeking habeas relief. *See Simpson v. Jones*, 238 F.3d 399, 407 (6th Cir. 2000).

Reasonable jurists could not debate that Petitioner failed to comply with the state's procedural rules or that the last reasoned state court judgment—the trial court's denial of Petitioner's motion for relief from judgment—relied on this procedural default in dismissing his ineffective assistance of counsel claim. *People v. English*, Case No. 00-2518-FH (St. Clair Co. Cir. Ct. Aug. 22, 2002). Petitioner did not raise his ineffective assistance of counsel claim on direct appeal and the trial court found that Petitioner had not shown good cause or actual prejudice for the default. The trial court's ruling was based upon state procedural rules and thus the court correctly held that the habeas petition was procedurally barred.

Further, reasonable jurists could not disagree with the court's conclusion that Petitioner has not shown cause or prejudice to excuse his procedural error. Petitioner has failed to persuasively explain why he did not raise the ineffective

assistance of counsel on direct appeal. He has also not demonstrated that his substantive claim has merit.

Finally, reasonable jurists could not disagree with the court's ruling that Petitioner failed to establish that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception to procedural errors requires a showing that a constitutional violation probably resulted in the conviction of one who is actually innocent (i.e., factually innocent rather than legally insufficient). *See Schlup v. Delo*, 513 U.S. 298, 326-27 (1995); *see also Bousley v. United States*, 523 U.S. 614, 624 (1998). Petitioner pleaded *nolo contendre* to two counts of vehicular manslaughter and one count of felonious driving in St. Clair County Circuit Court. Petitioner has presented only bare allegations that an investigation would have proved that he was not the driver of the car that hit and killed the victim; he presents no evidence that he is actually innocent. Accordingly, the court is not convinced that a miscarriage of justice occurred in this case.

For the reasons set forth above, a certificate of appealability will not issue.

s/ Robert H. Cleland
Robert M. Cleland
UNITED STATES DISTRICT JUDGE

June 30, 2004

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION AND DISMISSAL OF PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS DATED MAY 17, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 03-CV-73385-DT

MATTHEW S. ENGLISH,

Petitioner,

v.

SHERRY BURT,

Respondent.

OPINION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Matthew S. English, a state prisoner currently confined at the Southern Michigan Correctional Facility in Jackson, Michigan, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting that he is incarcerated in violation of his constitutional rights. The

matter is before the court on Respondent's motion for summary judgment seeking dismissal of the petition on the basis of procedural default. For the reasons set forth below, Respondent's motion will be granted and the petition for writ of habeas corpus will be dismissed.

I. FACTS

On December 27, 2000, Petitioner pleaded *nolo contendere* to two counts of vehicular manslaughter and one count of felonious driving in St. Clair County Circuit Court. The trial court initially granted Petitioner Youthful Trainee status and sentenced him to three years probation with the first 30 days to be served at the St. Clair County Jail, the next 120 days to be served at Huron House under house arrest, followed by Special Alternative Incarceration "boot camp" if Petitioner was physically able, and other conditions. The prosecution subsequently filed a motion to correct sentence on the ground that Youthful Trainee status was only available following a guilty plea, which the trial court granted. On May 29, 2001, the trial court re-sentenced Petitioner to five years of probation with the condition that he remain in custody during the first year of probation, including house arrest at Huron House and completion of Special Alternative Incarceration "boot camp", and other conditions.

Petitioner subsequently filed a claim of appeal with the Michigan Court of Appeals, which was dismissed for lack of jurisdiction because Petitioner did not have an appeal as of right from his plea-based conviction. *See People v. English*, Case No. 235040 (Mich. Ct. App. July 19, 2001).

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On July 25, 2001, Petitioner pleaded guilty to violating the conditions of his probation. On August 7, 2001, the trial court discharged him from probation as a violator and sentenced him to 72 to 180 months imprisonment with credit for 169 days served.

On August 8, 2002, Petitioner filed a motion for relief from judgment in the state trial court asserting that trial counsel was ineffective for: (1) erroneously advising him that he qualified for Youthful Trainee status, and (2) failing to have an independent accident reconstruction evaluation conducted which could have exonerated him of the most serious charges. The trial court denied the motion finding that Petitioner had failed "to establish `good cause' and 'actual prejudice' from the alleged irregularities in support of his claim for relief." *People v. English*, Case No. 00-2518-FH (St. Clair Co. Cir. Ct. Aug. 22, 2002). Petitioner filed an application for leave to appeal this decision with the Michigan Court of Appeals, which was denied "for lack of merit in the grounds presented." *People v. English*, Case No. 243738 (Mich. Ct. App. Oct. 10, 2002). Petitioner also filed an application for leave to appeal with the Michigan Supreme Court, which was denied for failure "to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. English*, 659 N.W.2d 234 (2003).

Petitioner, through counsel, filed his federal habeas petition on September 5, 2003, asserting that trial counsel was ineffective for failing to produce an independent accident reconstruction expert. On March 10, 2004, Respondent filed the instant motion for summary judgment seeking dismissal

of the habeas petition on the basis of procedural default. On March 30, 2004, Petitioner filed an answer and brief in response to the motion.

II. DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. 2241 *et seq.*, sets forth the standard of review that federal courts must apply when considering applications for a writ of habeas corpus raising constitutional claims. *See Wiggins v. Smith*, __ U.S. _, 123 S. Ct. 2527, 2534 (2003). The AEDPA applies to all habeas petitions filed after its effective date. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Because Petitioner instituted this action after the AEDPA's effective date, his case is governed by the AEDPA. As amended, 28 U.S.C. § 2254(d) imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light

> of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Petitioner claims that he is entitled to habeas relief because trial counsel was ineffective for failing to conduct accident reconstruction evaluation, which he claims would have exonerated him of the most serious charges against him. Respondent contends that this claim is barred by procedural default.

Federal habeas relief may be precluded on claims that a petitioner has not presented to the state courts in accordance with the state's procedural rules. *See Wainwright v. Sykes*, 433 U.S. 72, 85-87 (1977); *Couch v. Jabe*, 951 F.2d 94, 96 (6th Cir. 1991). A petitioner's procedural default in the state courts will preclude federal habeas review if the last state court rendering a judgment In the case rested its judgment on the procedural default. *Wainwright*, 433 U.S. at 85; *Coleman v. Mitchell*, 244 F.3d 533, 539 (6th Cir. 2001). In such a case, a federal court must determine not only whether a petitioner has failed to comply with state procedures, but also whether the state court relied on the procedural default or, alternatively, chose to waive the procedural bar. "A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263-64 (1989). The last explained state court judgment should be used to make this determination. *Yist v. Nunnemaker*, 501 U.S. 797, 803-05

(1991). If the last state judgment is a silent or unexplained denial, it is presumed that the last reviewing court relied upon the last reasoned opinion. *Id.*

Here, the Michigan Supreme Court relied upon Michigan Court Rule 6.508(D) in denying Petitioner leave to appeal. That rule provides, in part, that a court may not grant relief to a defendant if the motion for relief from judgment alleges grounds for relief which could have been raised on direct appeal, absent a showing of good cause for the failure to raise such grounds previously and actual prejudice resulting therefrom. *See* Mich. Ct. R. 6.508(D). The state court's decision, while brief, was based upon an independent and adequate state procedural rule. *See Simpson v. Jones*, 238 F.3d 399, 407 (6th Cir. 2000). Although the Michigan Supreme Court did not fully explain its decision, the record indicates that Petitioner failed to raise this issue on direct appeal of his convictions despite the opportunity to do so.

A state prisoner who fails to comply with a state's procedural rules waives the right to federal habeas review absent a showing of cause for noncompliance and actual prejudice resulting from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 753 (1991); *Gravley v. Mills*, 87 F.3d 779, 784-85 (6th Cir. 1996).

In this case, Petitioner neither alleges nor establishes cause to excuse his procedural default in failing to raise the ineffective assistance of trial counsel claim before the state courts on direct appeal of his convictions. A federal habeas court need not address the issue of prejudice when a petitioner

fails to establish cause to excuse a procedural default. *See Smith v. Murray*, 477 U.S. 527, 533 (1986); *Long v. McKeen*, 722 F.2d 286, 289 (6th Cir. 1983).

Further, Petitioner has not established that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception requires a showing that a constitutional violation probably resulted in the conviction of one who is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 624 (1998). Petitioner has made no such showing. At the August 25, 2000 preliminary examination, Petitioner's friend testified that Petitioner was using inhalants shortly before the accident, an eyewitness to the accident testified that she observed Petitioner's vehicle cross the center line and strike the other car, and police investigators trained in accident reconstruction opined that the physical evidence was consistent with the eyewitness testimony. The fact that defense experts may have offered testimony to counter the prosecution's evidence as to the circumstances of the accident does not establish Petitioner's actual innocence. Petitioner's claim is thus barred by procedural default and does not warrant habeas relief.

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III. CONCLUSION

IT IS ORDERED that Respondent's motion for summary judgment [Dkt. # 4] is GRANTED.

Dated: May 17, 2004

s/ Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE MICHIGAN SUPREME COURT DENYING APPLICATION FOR LEAVE TO APPEAL ENTERED MARCH 31, 2003 AND FILED APRIL 14, 2004

MICHIGAN SUPREME COURT
Lansing, Michigan

ORDER

Entered: March 31, 2003

SC: 122547
COA: 243738
St. Clair CC: 00-002518-FH

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

MATTHEW S. ENGLISH,

Defendant-Appellant.

On order of the Court, the application for leave to appeal from the October 10, 2002 decision of the Court of Appeals is considered, and it is DENIED because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

March 31, 2003

s/ Corbin R. Davis
Clerk

APPENDIX E — ORDER OF THE MICHIGAN COURT OF APPEALS DENYING DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL DATED OCTOBER 10, 2002 AND FILED APRIL 14, 2004

COURT OF APPEALS, STATE OF MICHIGAN

Donald S. Owens
Presiding Judge

Donald E. Holbrook, Jr.

Patrick M. Meter
Judges

People of MI v. Matthew S. English

Docket No. 243738

LC No. 00-002518-FH

ORDER

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

s/ Donald Owens
Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on OCT 10, 2002

s/ Sandra Schultz Mengel
Chief Clerk

APPENDIX F— ORDER OF THE ST. CLAIR COUNTY CIRCUIT COURT DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT DATED AUGUST 22, 2002

STATE OF MICHIGAN
IN THE 31ST CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR

Case No. 00-2518-FH
HON. JAMES P. ADAIR

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

MATTHEW SCOTT ENGLISH,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

At a session of said Court, continued and held in the County Building, in the City of Port Huron, on this 22 day of August, 2002.

On December 27, 2000, Defendant pled nolo contendere to two counts of Homicide Manslaughter – Motor Vehicle contrary to MCL 750.321-E and to one count of Driving Felonious, contrary to MCL 752.19. The Court granted the prosecutor's motion to correct the February 20, 2001 sentence

and on May 29, 2001, the Court re-sentenced Defendant to five years probation on terms and conditions including the first year in custody.

Defendant pled guilty to violating the terms and conditions of his probation on July 25, 2001. On August 7, 2001, this Court discharged Defendant from probation as a violator without improvement and sentenced him to a prison term of 72 to 180 months, with credit for 169 days previously served.

Defendant now brings this motion for relief from judgment pursuant to MCR 6.502 et. seq. The Court has reviewed Defendant's motion and supporting materials, as well as the file, records, transcripts and correspondence relating to the conviction. In particular, this Court has considered the Preliminary Examination testimony of Casey Tucker, Gail Stevens, and William Trout. Ms. Stevens was an eyewitness to the accident and testified that Defendant's vehicle crossed the center line causing the accident. Sergeant Trout has been trained in accident reconstruction and testified that his evaluation and observation of the physical evidence was consistent with Ms. Stevens testimony. Sergeant Beach of the Michigan State Police also completed an accident reconstruction.

The Court notes that the attorney representing a defendant in a criminal case is given substantial latitude in making strategic and tactical choices respecting that representation.

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Based upon the eyewitness testimony at the preliminary examination and the police testimony that the eyewitness version was consistent with the physical evidence and accident reconstruction, the Court finds Defendant's claim is without merit.

A review of the Plea transcript dated December 27, 2000 reveals that the Court advised the Defendant and the Defendant acknowledged that the plea would be accepted if it was conditioned upon a specific sentence and that no one could promise the Defendant what his sentence would be. Defendant also acknowledged that the plea was voluntary.

The Court finds that Defendant has failed in his burden to establish "good cause" and "actual prejudice" from the alleged irregularities in support of his claim for relief. For these reasons, it plainly appears to the Court upon review of the materials that Defendant is not entitled to the relief requested. Therefore, Defendant's Motion for Relief from Judgment is DENIED.

SO ORDERED.

Dated: August 22, 2002 s/ James P. Adair
JAMES P. ADAIR, Circuit Judge

APPENDIX G— ORDER OF THE MICHIGAN COURT OF APPEALS DISMISSING CLAIM OF APPEAL DATED JULY 19, 2001 AND FILED APRIL 14, 2004

IN THE MICHIGAN COURT OF APPEALS

ORDER

Re: People of MI v Matthew Scott English
Docket No. 235040
L.C. No. 00-002518-FH

Richard A. Bandstra, Chief Judge, acting under MCR 7.203(F)(1) and 7.216(A)(10), orders:

The claim of appeal is DISMISSED for lack of jurisdiction because the judgment of sentence, which was based on a plea to a crime committed after December 27, 1994, is not appealable as a matter of right. MCR 7.203(A)(1)(b). See also 1994 PA 375, MCL 600.308(2)(d); MSA 27A.308(2)(d). As a result, the order in question is appealable to this Court only if leave is granted under MCR 7.205. See MCR 7.203(B)(1).

JUL 19, 2001
Date

s/ Sandra Schultz Mengel
Chief Clerk

APPENDIX H — CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment of the U.S. Constitution

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for the defense.

Michigan Court Rule 6.508(D):

> **Entitlement to Relief:** The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
>
> (1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;
>
> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in the prior motion under this subchapter, unless the defendant demonstrates

Appendix H

(a) good cause for failure to raise such grounds on appeal or in the prior motion and

(b) actual prejudice from the alleged irregularities that support the claim for relief.

. . . .

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

Supreme Court, U.S.
FILED
APR 14 2005
OFFICE OF THE CLERK

No.04-951

In The
Supreme Court of the United States

MATTHEW S. ENGLISH

Petitioner,

v.

SHERRY BURT

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A habeas petitioner is not entitled to habeas relief on a claim that was not properly presented to the State courts where the State court refused to review the claim on that basis unless the petitioner can demonstrate cause for the default and actual prejudice or demonstrates that the failure to consider the claim will result in a fundamental miscarriage of justice. Here, Petitioner failed to raise his federal habeas claim in his direct appeal as required by the Michigan Court Rules, the Michigan Supreme Court refused to review the claim on that basis, and Petitioner did not make the required showing to overcome the default. Did the district court correctly grant summary judgment on the basis of procedural default?

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OPINIONS BELOW

Following Petitioner's plea-based conviction and sentence, Petitioner filed a claim of appeal. The Michigan Court of Appeals dismissed Petitioner's claim of appeal for lack of jurisdiction on July 19, 2001. *People v. English*, Michigan Court of Appeals no. 235040, Unpublished Order, App. 1a.

On August 8, 2002, Petitioner filed a motion for relief from judgment in the state trial court. On August 22, 2002, the trial court denied the motion. *People v. English*, Case No. 00-2518-FH, Unpublished Order, App. 2a.

Petitioner's application for leave to appeal the trial court's order denying collateral relief was denied by the Michigan Court of Appeals on October 10, 2002. *People v. English*, Michigan Court of Appeals no. 243738, App. 4a. Petitioner's subsequent application for leave to appeal in the Michigan Supreme Court was denied on March 31, 2003. *People v. English*, Michigan Supreme Court no. 122547, App. 5a.

Petitioner's application for a writ of habeas relief filed in the United States District Court for the Eastern District of Michigan was dismissed on May 17, 2004, App. 6a. The United States Court of Appeals for the Sixth Circuit denied Petitioner a certificate of appealability on December 6, 2004, App. 12a.

JURISDICTION

Petitioner was convicted by way of his guilty plea in St. Clair County, Michigan, Circuit Court on July 25, 2001. The district court denied Petitioner's application for a writ of habeas corpus on May 17, 2004. The United States Court of Appeals for the Sixth Circuit denied Petitioner's request for a certificate of appealability on December 3, 2004. The petition for writ of certiorari is being filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Michigan Court Rule (M.C.R.) 6.508(D) provides:

> Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
>
> (1) seeks relief from a judgment of conviction and sentence that still is subject to change on appeal pursuant to subchapter 7.200 or subchapter 7.300;
>
> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceedings under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
>
> (3) alleges grounds for relief, other than jurisdictional defects which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief.

STATEMENT OF THE CASE

On December 27, 2000, Petitioner pleaded *nolo contendere* to two counts of vehicular manslaughter and one count of felonious driving in the St. Clair County Circuit Court, Michigan. The trial court initially granted Petitioner Youthful Trainee status and sentenced him to three years probation with

the first 30 days to be served at the St. Clair County Jail, the next 120 days to be served at Huron House under house arrest, followed by Special Alternative Incarceration "boot camp" if Petitioner met certain conditions. The prosecution subsequently filed a motion to correct the sentence on the ground that Youthful Trainee status was only available following a guilty plea, which the trial court granted. On May 29, 2001, the trial court re-sentenced Petitioner to five years probation with the condition that he remain in custody during the first year of probation, including house arrest at Huron House and completion of Special Alternative Incarceration "boot camp," and other conditions.

Petitioner subsequently filed a claim of appeal with the Michigan Court of Appeals, which was dismissed for lack of jurisdiction because Petitioner did not have an appeal of right from his plea-based conviction. *See People v. English*, Michigan Court of Appeals no. 235040, App. 1a.

On July 25, 2001, Petitioner pleaded guilty to violating the conditions of his probation. On August 7, 2001, the trial court discharged him from probation as a violator and sentenced him to 72 to 180 months imprisonment with credit for 169 days served.

On August 8, 2002, Petitioner filed a motion for relief from judgment in the state trial court asserting that trial counsel was ineffective for: (1) erroneously advising him that he qualified for Youthful Trainee status, and (2) failing to have an independent accident reconstruction evaluation conducted. The trial court denied the motion finding that Petitioner had failed "to establish 'good cause' and 'actual prejudice' from the alleged irregularities in support of his claim for relief." (August 22, 2002 Opinion and Order Denying Motion for Relief from Judgment, p 2). Petitioner filed an application for leave to appeal this decision with the Michigan Court of Appeals, which was denied "for lack of merit in the grounds

presented." *People v. English*, Michigan Court of Appeals no. 243738, App. 4a. Petitioner also filed an application for leave to appeal with the Michigan Supreme Court, which was denied for failure "to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. English*, Michigan Supreme Court no. 122547, App. 5a.

Petitioner, through counsel, filed his federal habeas petition on September 5, 2003, asserting that trial counsel was ineffective for failing to obtain an independent accident reconstruction expert. On March 10, 2004, Respondent filed a motion for summary judgment seeking dismissal of the petition on the basis of procedural default. On May 17, 2004, the district court granted the motion for summary judgment and dismissed the petition. Petitioner then filed an application for a certificate of appealability in the United States Court of Appeals for the Sixth Circuit. On December 6, 2004, the Court of Appeals denied the application.

REASONS FOR DENYING THE PETITION

This petition raises only one issue and it involves a simple matter of State procedural law. Petitioner claims that the Michigan Supreme Court's order denying leave to appeal from the denial of his motion for relief from judgment is not a sufficient invocation of a procedural bar so as to warrant summary dismissal. This question, which is entirely dependent on state procedural rules, does not present an important question of federal law. Moreover, the Sixth Circuit's interpretation of that state procedural law is not in conflict with any of this Court's decisions nor is it in conflict with any other circuit decision. Finally, the district court correctly granted summary judgment on the basis of procedural default. Because the claim does not present an important question of federal law and is without merit, this Court should not grant certiorari.

I. A habeas petitioner is not entitled to habeas relief on a claim that was not properly presented to the State courts where the State court refused to review the claim on that basis unless the petitioner can demonstrate cause for the default and actual prejudice or demonstrates that the failure to consider the claim will result in a fundamental miscarriage of justice. Here, Petitioner failed to raise his federal habeas claim in his direct appeal as required by the Michigan Court Rules, the Michigan Supreme Court refused to review the claim on that basis, and Petitioner did not make the required showing to overcome the default. Did the district court correctly grant summary judgment on the basis of procedural default?

A State prisoner may not challenge the constitutionality of his conviction by seeking habeas relief under 28 U.S.C. § 2254 unless he has exhausted his available State remedies. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The State exhaustion requirement may not be circumvented by failing to follow State procedural rules. *See Gray v. Netherland*, 518 U.S. 152, 162 (1996). If a State prisoner fails to obtain review of his federal constitutional claim in State court because he failed to present it in accordance with state procedural rules, federal habeas review is also barred unless the prisoner can demonstrate cause for the default and actual prejudice, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman, supra* at 750-751.

In deciding whether a habeas petitioner procedurally defaulted his federal claim in state court, the federal habeas court examines three factors: (1) whether there is a State procedural rule applicable to the petitioner's claim that he did not comply with; (2) whether the State courts actually enforced the State procedural rule against petitioner's claim; and (3) whether the State procedural forfeiture is an adequate and

independent State ground upon which the state can rely to foreclose review. *Hutchinson v. Bell*, 303 F.3d 720, 735 (6th Cir. 2002).

In this case, the Michigan Supreme Court denied leave to appeal pursuant to M.C.R. 6.508(D). Subchapter 6.500 of the Michigan Court Rules governs motions for relief from judgment in criminal cases in Michigan and provides the exclusive procedure for challenging a conviction or sentence after the conclusion of the defendant's direct appeal. M.C.R. 6.508(D) states as follows:

> (D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
>
> (1) seeks relief from a judgment of conviction and sentence that still is subject to change on appeal pursuant to subchapter 7.200 or subchapter 7.300;
>
> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceedings under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
>
> (3) alleges grounds for relief, other than jurisdictional defects which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief.

There is no question that this provision is an applicable State procedural rule requiring a State prisoner to bring all of his claims in his direct appeal. It is undisputed that Petitioner did not comply with the rule. Petitioner does not assert that the provision is not an adequate and independent state ground upon which the state can rely to deny review. Thus, the only question here is whether the Michigan Supreme Court's order denying leave to appeal from the denial of his motion for relief from judgment was an actual enforcement of that rule. In determining whether a state court based its judgment on a procedural rule, a federal habeas court must determine whether the last order issued by the state court is explained or unexplained. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Coleman, supra* at 750. An unexplained order is an order whose text or accompanying opinion does not disclose the reason for the judgment. *Ylst*, 501 U.S. at 802. Where the last state court order denying a federal claim is unexplained by opinion or text, the habeas court should "look through" the unexplained order to the last reasoned opinion to determine whether the state courts had earlier imposed a procedural default which was merely affirmed by the higher court. *Id.*

If the order is explained, in that the text discloses reliance on a procedural bar, the federal habeas court must impose the procedural default. Here, the order at issue is the March 31, 2003, standard order of the Michigan Supreme Court that stated: "On order of the Court, the application for leave to appeal from the October 10, 2002, decision of the Court of Appeals is considered, and it is DENIED because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)."

The standard order used by the Michigan Supreme Court in this case has been held to be an explained order in no less than four published Sixth Circuit decisions. *See Hargrave-Thomas v. Yukins*, 374 F.3d 383 (6th Cir. 2004); *Burroughs v. Makowski*, 282 F.3d 410 (6th Cir. 2002); *Simpson v. Jones*, 238 F.3d 399 (6th Cir. 2000); *Munson v. Kapture*, 384 F.3d 310 (6th Cir. 2004). In *Munson*, 384 F.3d at 313, the Sixth Circuit specifically held:

> For purposes of procedural default, the "state judgment" with which we are concerned is "the last *explained* state court judgment." *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991). [Petitioner] argues that the last state court judgment is the trial court's opinion denying his post-conviction motion for relief. . . Contrary to [Petitioner]'s assertion, however, the last explained state court judgment in this case is the Michigan Supreme Court's order denying review of [Petitioner]'s claims based upon his failure to comply with Rule 6.508(D). We have held that orders such as that issued by the Michigan Supreme Court constitute "explained" state court judgments for purposes of procedural default. *See, e.g., Simpson v. Jones*, 238 F.3d 399, 407-08 (6th Cir. 2000)(holding that an order issued by the Michigan Supreme Court stating that the petitioner had "failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)"-though "brief"-constituted the last explained state court judgment in the case).

The *Munson* court's interpretation of the Michigan Supreme Court's order, i.e. that it is a reliance on a procedural default has been repeatedly affirmed in the Sixth Circuit and more importantly it has been affirmed by the Michigan Supreme Court itself.

In 2001, the Michigan Supreme Court issued a decision in *People v. Jackson*, 465 Mich. 390; 633 NW2d 825 (2001). In *Jackson*, in a post-judgment motion for relief from judgment, the defendant maintained that he was not required to show good cause for failure to raise his claim regarding improper waiver of jurisdiction by the juvenile division of the probate court in his direct appeal or that he suffered actual prejudice as a result. The Michigan Supreme Court rejected Jackson's argument explaining that:

> Pursuant to MCR 6.508(D), "the defendant has the burden of establishing entitlement to the relief requested." The circuit judge's second opinion discussed the merits of the juvenile court waiver issue and found it to be without merit. Accordingly, the defendant failed to establish his entitlement to relief. Thus, the defendant has not been deprived of review of the issue by the operation of subrule (D)(3). [*People v. Jackson*, 465 Mich. at 834]

The Michigan Court appended a footnote at the end of the above-quoted excerpt (footnote 10) which stated:

> Nor does the Court of Appeals citation of the court rule indicate otherwise. The Court of Appeals cited MCR 6.508(D), of which sub-rule (3) is only a part. The Court of Appeals [standard form] order [denying the application for failure to meet the burden of establishing entitlement to relief under MCR 6.508] cited the rule in the context of its statement that the defendant had not met his burden, and did not refer to this as a failure to establish good cause or prejudice.

The State of Michigan moved for rehearing in *Jackson*, specifically asking the Michigan Supreme Court to delete footnote 10 from its opinion. In the motion for rehearing, the State explained the reason for its request:

> The footnote seems to indicate that the Michigan appellate courts' orders that cite MCR 6.508(D) are ambiguous, i.e., the application could have been denied on the merits or it could have been denied on the basis of failure to establish cause and prejudice. Obviously if the order is ambiguous, it is not an explained order and the State is deprived of its procedural default defense in all cases in which the above form orders are issued. Such a result puts in jeopardy state convictions that have been litigated in state courts.

Following the issuance of the opinion in *People v. Jackson*, the United States District Court for the Eastern District of Michigan issued a Report and Recommendation interpreting footnote 10 as an indication that Court's order implied a merit review. The State then supplemented its motion for rehearing stating:

> . . . The federal court for the eastern district has now interpreted footnote 10 even more broadly than the States had feared, i.e., that this Court's form orders are not ambiguous, but necessarily imply a decision by the Court on the merits of the claims. . . .
>
> This interpretation completely eviscerates the procedural default defense in habeas proceedings in Michigan because the State cannot rely on a procedural default defense if the last state court addressed the merits. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Thus, the State finds itself in the position of defending claims held by the federal court to have been addressed on the merits that may never have had any review by any state court.
>
> The impact of footnote 10 goes far beyond just increasing the number of claims that the States will

> required be to respond to on the merits. It has placed the State in the position of defending state court convictions without the benefit of state court review at every level with the accompanying record, review, and analysis. . . .
>
> Finally, the federal court's interpretation of footnote 10 denies the State the advantage of relying on this Court's procedural rulings which there is every reason to believe the Court does apply when appropriate pursuant to M.C.R. 6.508(D)(2) and (3).

On November 8, 2001, the Michigan Supreme Court ruled on the State's rehearing motion, and in lieu of granting rehearing, the Court amended its September 25, 2001, opinion in *Jackson* and deleted footnote 10.

As can be seen from this discussion, the entire basis of the State's motion for rehearing in the Michigan Supreme Court was that the federal courts could interpret footnote 10 as implying that the standard order was not a procedural default. As a result, within days of issuing its opinion in *People v. Jackson*, the Michigan Supreme Court deleted the footnote so that there would be no confusion over whether the order invoked a procedural bar.

Petitioner's argument that the Michigan Supreme Court's order is an unexplained order has been rejected several times by the Sixth Circuit as well as by the Michigan Supreme Court itself. Therefore, since Petitioner failed to present his federal habeas claim to the state courts in accordance with state procedural rules and since the Michigan Supreme Court relied upon that rule in denying relief, Petitioner's claim is procedurally defaulted unless he can establish cause and prejudice of a miscarriage of justice.

Petitioner argues that, even if his claim is procedurally defaulted, habeas review is not barred because he can show cause to excuse the default. Petitioner points out that he was not entitled to a direct appeal by right nor was he entitled to appointed counsel to pursue that appeal. Petitioner's argument overlooks two critical facts. First, the State did not deny Petitioner review of his federal habeas claim because he failed to obtain a merit review of it. Rather, the State refused to review it collaterally because Petitioner could have, but did not, present the claim for review in his application for leave to appeal. Second, while Petitioner may not have been entitled to appointed counsel under Michigan law, the fact is he had counsel when he sought review in the Michigan Court of Appeals. Thus, neither of those facts constitutes cause to excuse his procedural default.

Petitioner also argues that habeas review is not barred because he has shown a miscarriage of justice. Specifically, Petitioner argues that "his 'actual innocence' was established through the initial police investigation and the reports of the defense accident reconstructionists who found that Mr. English was not to blame for the accident." In order to invoke the narrow exception of "miscarriage of justice" a petitioner is required to show that a constitutional violation has probably resulted in the conviction of who is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 314, 321 (1995). Such a claim requires a petitioner to support his allegations of constitutional error with new reliable evidence of his actual innocence. Since Petitioner has not supported his claim that he is actually innocent with new evidence, the exception does not apply. *Id.* at 324.

In sum, because Petitioner failed to present his claim to the state courts in accordance with state rules and because the Michigan Supreme Court relied upon that rule in denying relief, the claim is procedurally defaulted. Petitioner has not established cause and prejudice nor has he established a

fundamental miscarriage of justice. Therefore, the district court in this case correctly determined that habeas review is barred and granted Respondent's motion for summary judgment and the Sixth Circuit correctly denied a certificate of appealability.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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Dated: April, 2005

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IN THE MICHIGAN COURT OF APPEALS

ORDER

Re: People of MI v Matthew Scott English
Docket No. 235040
L.C. No. 00-002518-FH

Richard A. Bandstra, Chief Judge, acting under MCR 7.203(F)(1) and 7.21 6(A)(1 0), order:

The claim of appeal is DISMISSED for lack of jurisdiction because the judgment of sentence, which was based on a plea to a crime committed after December 27, 1994, is not appealable as a matter of right. MCR 7.203(A)(l)(b). See also 1994 PA 375, MCL 600.308(2)(d); MSA 27A.308(2)(d). As a result, the order in question is appealable to this Court only if leave is granted under MCR 7.205. See MCR 7.203(B)(l).

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on JUL 19, 2001

SEAL OF THE
MICHIGAN COURT
OF APPEALS

___/s/_____
Chief Clerk

STATE OF MICHIGAN
IN THE 31st CIRCUIT COURT FOR THE
COUNTY OF ST. CLAIR

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

vs. Case No. 00-25 1 8-FH
HON. JAMES P. ADAIR

MATTHEW SCOTT ENGLISH,
Defendant.

_____/

ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

At a session of said Court, continued and held in the County Building, in the City of Port Huron, on this 22nd day of August, 2002.

On December 27, 2000, Defendant pled nolo contendere to two counts of Homicide Manslaughter - Motor Vehicle, contrary to MCL 750.321-E and to one count of Driving Felonious, contrary to MCL 752.191. The Court granted the prosecutor's motion to correct the February 20, 2001 sentence and on May 29, 2001, the Court re-sentenced Defendant to five years probation on terms and conditions including the first year in custody.

Defendant pled guilty to violating the terms and conditions of his probation on July 25, 2001. On August 7, 2001, this Court discharged Defendant from probation as a violator without improvement and sentenced him to a prison term of 72 to 180 months, with credit for 169 days previously served.

Defendant now brings this motion for relief from judgment pursuant to MCR 6.502 et.seq. The Court has reviewed Defendant's motion and supporting materials, as well as the file, records, transcripts and correspondence relating to the conviction. In particular, this Court has considered the Preliminary Examination

testimony of Casey Tucker, Gail Stevens, and William Trout. Ms. Stevens was an eyewitness to the accident and testified that Defendant's vehicle crossed the center line causing the accident. Sergeant Trout has been trained in accident reconstruction and testified that his evaluation and observation of the physical evidence was consistent with Ms. Stevens testimony. Sergeant Beach of the Michigan State Police also completed an accident reconstruction.

The Court notes that the attorney representing a defendant in a criminal case is given substantial latitude in making strategic and tactical choices respecting that representation.

Based upon the eyewitness testimony at the preliminary examination and the police testimony that the eyewitness version was consistent with the physical evidence and accident reconstruction, the Court finds Defendant's claim is without merit.

A review of the Plea transcript dated December 27, 2000 reveals that the Court advised the Defendant and the Defendant acknowledged that the plea would not be accepted if it was conditioned upon a specific sentence and that no one could promise the Defendant what his sentence would be. Defendant also acknowledged that the plea was voluntary.

The Court finds that Defendant has failed in his burden to establish "good cause" and "actual prejudice" from the alleged irregularities in support of his claim for relief. For these reasons, it plainly appears to the Court upon review of the materials that Defendant is not entitled to the relief requested. Therefore, Defendant's Motion for Relief from Judgment is DENIED.

SO ORDERED.

Dated: August 22, 2002

_____/s/_____
JAMES P. ADAIR,
Circuit Judge

COURT OF APPEALS, STATE OF MICHIGAN

ORDER

People of MI v Matthew S English — Donald S. Owens
Docket No. 243738 — Presiding Judge
LC No. 00-002518-FH

Donald E. Holbrook, Jr.
Patrick M. Meter, Judges

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

_____/s/_____
Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on OCT 10, 2002

SEAL OF THE MICHIGAN
COURT OF APPEALS

_____/s/_____
Chief Clerk

ORDER
Entered: March 31, 2003

122547

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v
MATTHEW S. ENGLISH,
Defendant-Appellant.
_____/

Michigan Supreme Court Lansing, Michigan
Maura D. Corrigan, Chief Justice
Michigan F. Corrigan, Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman, Justices
SC: 122547
COA: 243738
St. Clair CC: 00-002518-FH

On order of the Court, the application for leave to appeal from the October 10, 2002 decision of the Court of Appeals is considered, and it is DENIED because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

SEAL OF THE MICHIGAN SUPREME COURT

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 31, 2003

_____/s/_____
Corbin R. Davis

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MATTHEW S. ENGLISH,
Petitioner,

v. Case No. 03-CV-73385-DT

SHERRY BURT,
Respondent.
_____/

OPINION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Matthew S. English, a state prisoner currently confined at the Southern Michigan Correctional Facility in Jackson, Michigan, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting that he is incarcerated in violation of his constitutional rights. The matter is before the court on Respondent's motion for summary judgment seeking dismissal of the petition on the basis of procedural default. For the reasons set forth below, Respondent's motion will be granted and the petition for writ of habeas corpus will be dismissed.

I. FACTS

On December 27, 2000, Petitioner pleaded nolo contendere to two counts of vehicular manslaughter and one count of felonious driving in St. Clair County Circuit Court. The trial court initially granted Petitioner Youthful Trainee status and sentenced him to three years probation with the first 30 days to be served at the St. Clair County Jail, the next 120 days to be served at Huron House under house arrest, followed by Special Alternative Incarceration "boot camp" if

Petitioner was physically able, and other conditions. The prosecution subsequently filed a motion to correct sentence on the ground that Youthful Trainee status was only available following a guilty plea, which the trial court granted. On May 29, 2001 , the trial court re-sentenced Petitioner to five years of probation with the condition that he remain in custody during the first year of probation, including house arrest at Huron House and completion of Special Alternative Incarceration "boot camp", and other conditions.

Petitioner subsequently filed a claim of appeal with the Michigan Court of Appeals, which was dismissed for lack of jurisdiction because Petitioner did not have an appeal as of right from his plea-based conviction. *See People v. English*, Case No. 235040 (Mich. Ct. App. July 19, 2001).

On July 25, 2001, Petitioner pleaded guilty to violating the conditions of his probation. On August 7, 2001, the trial court discharged him from probation as a violator and sentenced him to 72 to 180 months imprisonment with credit for 169 days served.

On August 8, 2002, Petitioner filed a motion for relief from judgment in he state trial court asserting that trial counsel was ineffective for: (1) erroneously advising him that he qualified for Youthful Trainee status, and (2) failing to have an independent accident reconstruction evaluation conducted which could have exonerated him of the most serious charges. The trial court denied the motion finding that Petitioner had failed "to establish 'good cause' and 'actual prejudice' from the alleged irregularities in support of his claim for relief." *People v. English*, Case No. 00-2518-FH (St. Clair Co. Cir. Ct. Aug. 22, 2002). Petitioner filed an application for leave to appeal this decision with the Michigan Court of Appeals, which was denied "for lack of merit in the grounds presented." *People v. English*, Case No. 243738 (Mich. Ct. App. Oct. 10, 2002).

Petitioner also filed an application for leave to appeal with the Michigan Supreme Court, which was denied for failure "to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. English*, 659 N.W.2d 234 (2003).

Petitioner, through counsel, filed his federal habeas petition on September 5, 2003, asserting that trial counsel was ineffective for failing to produce an independent accident reconstruction expert. On March 10, 2004, Respondent filed the instant motion for summary judgment seeking dismissal of the habeas petition on the basis of procedural default. On March 30, 2004, Petitioner filed an answer and brief in response to the motion.

II. DISCUSSION

The Antiterrorism and Effective Death Penalty Act of I 996 ("AEDPA"), codified at 28 U.S.C. 2241 et. seq., sets forth the standard of review that federal courts must apply when considering applications for a writ of habeas corpus raising constitutional claims. *See Wiggins v. Smith*, U.S., 123 5. Ct. 2527, 2534 (2003). The AEDPA applies to all habeas petitions filed after its effective date. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Because Petitioner instituted this action after the AEDPA's effective date, his case is governed by the AEDPA. As amended, 28 U.S.C. § 2254(d) imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Petitioner claims that he is entitled to habeas relief because trial counsel was ineffective for failing to conduct accident reconstruction evaluation, which he claims would have exonerated him of the most serious charges against him. Respondent contends that this claim is barred by procedural default.

Federal habeas relief may be precluded on claims that a petitioner has not presented to the state courts in accordance with the state's procedural rules. *See Wainwright v. Sykes*, 433 U.S. 72, 85-87 (1977); *Couch v. Jabe*, 951 F.2d 94, 96 (6th Cir. 1991). A petitioner's procedural default in the state courts will preclude federal habeas review if the last state court rendering a judgment in the case rested its judgment on the procedural default. *Wainwright*, 433 U.S. at 85; *Coleman v. Mitchell*, 244 F.3d 533, 539 (6th Cir. 2001). in such a case, a federal court must determine not only whether a petitioner has failed to comply with state procedures, but also whether the state court relied on the procedural default or, alternatively, chose to waive the procedural bar. 'A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar."

Harris v. Reed, 489 U.S. 255, 263-64 (1989). The last explained state court judgment should be used to make this determination. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-05 (1991). If the last state judgment is a silent or unexplained denial, it is presumed that the last reviewing court relied upon the last reasoned opinion. *Id.*

Here, the Michigan Supreme Court relied upon Michigan Court Rule 6.508(D) in denying Petitioner leave to appeal. That rule provides, in part, that a court may not grant relief to a defendant if the motion for relief from judgment alleges grounds for relief which could have been raised on direct appeal, absent a showing of good cause for the failure to raise such grounds previously and actual prejudice resulting therefrom. See Mich. Ct. R. 6.508(D). The state court's decision, while brief, was based upon an independent and adequate state procedural rule. *See Simpson v. Jones*, 238 F.3d 399, 407 (6th Cir. 2000). Although the Michigan Supreme Court did not fully explain its decision, the record indicates that Petitioner failed to raise this issue on direct appeal of his convictions despite the opportunity to do so.

A state prisoner who fails to comply with a state's procedural rules waives the right to federal habeas review absent a showing of cause for noncompliance and actual prejudice resulting from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice. See *Coleman v. Thompson*, 501 U.S. 722, 753 (1991); *Gravley v. Mills*, 87 F.3d 779, 784-85 (6th Cir. 1996).

In this case, Petitioner neither alleges nor establishes cause to excuse his procedural default in failing to raise the ineffective assistance of trial counsel claim before the state courts on direct appeal of his convictions. A federal habeas court need not address the issue of prejudice when a petitioner fails to establish

cause to excuse a procedural default. *See Smith v. Murray*, 477 U.S. 527, 533 (1986); *Long v. McKeen*, 722 F 286, 289 (6th Cir. 1983).

Further, Petitioner has not established that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception requires a showing that a constitutional violation probably resulted in the conviction of one who is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). "' innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 624 (1998). Petitioner has made no such showing. At the August 25, 2000 preliminary examination, Petitioner's friend testified that Petitioner was using inhalants shortly before the accident, an eyewitness to the accident testified that she observed Petitioner's vehicle cross the center line and strike the other car, and police investigators trained in accident reconstruction opined that the physical evidence was consistent with the eyewitness testimony. The fact that defense experts may have offered testimony to counter the prosecution's evidence as to the circumstances of the accident does not establish Petitioner's actual innocence. Petitioner's claim is thus barred by procedural default and does not warrant habeas relief.

III. CONCLUSION

IT IS ORDERED that Respond motion for summary judgment [Dkt. # 4] is GRANTED.

/s/
ROBERT H. CLELAND
UNITED STATES
DISTRICT JUDGE

Dated: May 17, 2004

No. 04-1717

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT FILE

MATTHEW S. ENGLISH,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	**ORDER**
	)	
SHERRY BURT, Warden,	)	
	)	
Respondent-Appellee.	)	
	)	

Matthew S. English, a Michigan state prisoner, moves through counsel for a certificate of appealability and appeals a district court judgment dismissing his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254.

Upon consideration, the motion for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

_____/s/_____
Clerk